Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1021

GRANVILLE CENTRAL SCHOOL DISTRICT, BOARD OF EDUCATION, WILLIAM E. BUTLER, DON L. MILLER, FREDERICK J. REED, BEVERLY TATKO, ROBERT L. FLOWER, TERRY M. KNIPES, WALTER PERRY III, FRANK P. VILLANO, DONALD BINCK, MARIE VANDERMINDEN, and THERESA MCCAULIFFE, each individually and in their official capacities,

Petitioners,

—against—

DONNA THOMAS, JOHN TIEDEMAN, by and through his parents Mr. & Mrs. Henry Tiedeman, DAVID JONES, by and through his parents Mr. & Mrs. John E. Jones, RICHARD WILLIAMS, by and through his parents Mr. & Mrs. Arthur F. Williams,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinions are set forth in the appendices to the Petition.

Jurisdiction

Jurisdiction is as set forth in the Petition.

Questions Presented

1) Whether, high school administrators may punish students for distribution of a publication intended solely for off-campus consumption even though the school administrators concede that they do not desire to regulate student activities off campus.

2) Whether even if a student publication significantly involved on-campus activity, punishment for its publication was prohibited by the first amendment.

Statutes Involved

The Petition sets forth the relevant, and some irrelevant, statutes involved.

REASONS FOR DENYING THE WRIT

I.

Petitioners' Questions Presented Are Not Appropriate for Review by the Court.

Five of the six questions petitioners present are far from the mark of a cognizable issue for the Court.* The sixth--Question 2--is also not appropriate for

* Question 1, concerning whether a public school must make its facilities available for student publications, was never presented or decided in the court of appeals.
(fn. cont. on next page)

review, but deserves discussion in opposition to the granting of a petition for certiorari.

(fn. cont. from preceding page)
Question 2 will be discussed in the text, above.

Question 3--whether actual disruption of educational process need be proved to justify punishment for First Amendment activities --was also not decided by the court of appeals.

Similarly Question 4--whether a prior restraint requires an independent adjudication--was not an issue in the case, for the Court of Appeals characterized the effect on the students as punishment for, not censorship of, First Amendment activities only. Prior restraint was not an issue reached.

Question 5--whether the defendant school administrators were bound by the statement of reasons for punishment in the suspension letter to the students' parents--also misses the point made by the court of appeals. As an evidentiary matter, relying on New York Times v. Sullivan, 376 U.S. 254, 285 (1964), the court of appeals found that the punishment of the students was for distribution of the lampoon and not some other offense. Review in this Court should not be premised on a review of the court of appeals' power to reach that conclusion, especially, when as here, the facts on which the conclusion was based are not disputed by either side. Only the characterization of those facts as First Amendment activity is in question.

And Question 6, actually two questions--is it error to characterize facts differently than the district court and did the court of
(fn. cont. on next page)

The proper way to frame Question 2 is as follows (see also Questions Presented, this brief): whether high school administrators may punish students for distributing a publication intended solely for off-campus consumption even though the school administrators concede that they do not desire to regulate students activities off campus. For as narrowly framed by the court of appeals, the decision here simply involves a

(fn. cont. from preceding page)
appeals fail to decide the issue presented to it--is duplicative of Questions 5 and 2 respectively. Though it is true that the court of appeals' characterized certain facts differently than the district court, the facts themselves were never in dispute. For example, storage of the lampoon in a closet and editing stories after school in a classroom were characterized by the Court of Appeals as "de minimus" school activities and, by the district court as insubordinate school activities. The fact of storage and after-school editing were never disputed. Thus, this part of Question 6 is inappropriate for review for the same reason that Question 5 should not be reviewed.

The second part of Question 6--did the court of appeals fail to reach the issue presented to it--duplicates Question 2--can a school punish students for first amendment activities directed at outside school activities.

mistake by the defendants: they punished students for off-campus activities they mistakenly believed involved significant on-campus activities. But with good reason the court of appeals disagreed, calling all connections with the school "de minimus." For in this case there is no contention that the students did more than store and edit a small portion of the material in one teacher's room after school hours. Copies of the magazine were not distributed in school and no public property or resources were used for production or distribution. And, the cover of the one issue published specifically any school connections.

The narrow resolution which disposed of the case below was simply a decision that a school which mistakenly punished students for on-campus first amendment activity may not do so when in fact the activity was, in essence, off-campus. Thus, the question presented here is primarily evidentiary and could only be accepted for review if the Court decided that the paltry connections with the high school campus gave the school a right to punish the students, or if the Court concluded that due process permitted a school to punish its students for off-campus first amendment activities the school itself had conceded were outside its jurisdiction.

Furthermore, even if the Court found either of these questions worthy of review, the case should not be taken unless the larger question not reached below (see Questions Presented above) could also be resolved; namely, whether, even if preparation and distribution of this lampoon did constitute on-campus activity, its publishers were not protected from punishment for their expression by the first amendment.

II.

Even if the Student-Respondents' Publishing Activities may be Characterized as On-Campus, they were Protected by the First Amendment.

The students distributed their lampoon--"Hard Times"--without incident. The petitioner school administrators received a copy of "Hard Times" on the first day of distribution. And, the publication circulated for six days without comment or disruption before petitioners ever investigated its origin; the ultimate investigation resulted solely from a complaint by the chairperson of the Board of Education who decided to take matters into her own hands.

The circuit courts of appeal have uniformly protected students who published both on and off campus. Student publication rights have without exception been protected even when the matter distributed was indecent, albeit non-obscene. Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd without opinion, 515 F. 2d 504 (2nd Cir. 1975); Eisner v. Stamford Board of Education, 440 F. 2d 803 (2nd Cir. 1971); Trachtman v. Anker, 563 F. 2d 512 (2nd Cir. 1977), cert den., 435 U.S. 925 (1978); Jacobs v. School Commissioners, 490 F. 2d 601 (7th Cir. 1973); vacated as moot, 420 U.S. 128 (1975); Fujishima v. Board of Education, 460 F. 2d 135 (7th Cir. 1972); Scoville v. Board of Education, 425 F. 2d 10 (7th Cir. 1970); Shanley v. Northeast Independent School Dist., 462 F. 2d 960 (5th Cir. 1972); Quarterman v. Byrd, 453 F. 2d 54 (4th Cir. 1971); Baughman v. Freienmuth, 478 F. 2d 1345 (4th Cir. 1973); Nitzberg v. Parks, 525 F. 2d 378 (4th Cir. 1975);

Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E.D. Va. 1977), aff'd, 564 F. 2d 157 (4th Cir. 1977); Riseman v. School Committee of the City of Quincy, 439 F. 2d 148 (1st Cir. 1971).

Therefore, clearly non-disruptive literature such as "Hard Times," not predicted to be disruptive by any school administrator at Granville High School, cannot provide a basis for punishment of students by school authorities. In order to grant review in this case the Court would have to be prepared to say otherwise.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be denied review.

Dated: New York, New York
January 25, 1980

Respectfully submitted,

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